D & C FINANCE BHD.

v.

THE OVERSEAS ASSURANCE CORP. LTD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. D4-23-1340-88]
31 MAY 1989

ARBITRATION: *Stay of all proceedings pending arbitration - Pursuant to s. 6 of Arbitration Act 1952 - Agreement to contain arbitration clause - Applicant to be ready & willing to do all things necessary to the proper conduct of the arbitration - Onus on party opposing the application to stay.*

By an insurance policy dated 5 March 1985, the defendant, in consideration of the premium paid by the plaintiff, agreed to indemnify the plaintiff against loss and damages occasioned by fire, theft and accident to the plaintiff's equipments up to a maximum of RM187,000. During the currency of the insurance policy, the equipments insured were totally destroyed by fire. Consequently, the plaintiff submitted their claim but the defendant by a letter repudiated liability. In view thereof, the plaintiff commenced suit against the defendant.

The defendant in turn filed an application for stay of all proceeding pursuant to s. 6 of the Arbitration Act 1952. The defendant relied on condition 6 of the insurance policy by submitting that the matters in dispute in this action i.e., the difference between parties on quantum of damages, were within the scope of the insurance policy to refer all differences arising thereunder to arbitration. The defendant further stated that at the time the action was commenced, the defendant was and remained ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration. However the plaintiff opposed and submitted, *inter alia*, that the amount or the quantum was not in dispute, therefore did not give rise to a "difference" calling the arbitration clause in the insurance policy into operation.

Held:

[1] Whether or not stay will be granted, the Court had to be satisfied with the requirements of s. 6 of the Arbitration Act, namely:

(a) there was an agreement between the parties and the agreement contained an arbitration clause

(b) that the applicant had not taken any other steps in the proceedings.

(c) there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(d) that the applicant was at the time when the proceedings were commenced, still ready and willing to do all things necessary to the proper conduct of the arbitration.

[2] There was an agreement entered into between the plaintiff and the defendant. An arbitration clause was provided for in the agreement i.e., condition 6. Upon reading the 2 letters exhibited by the defendant in its affidavit, the Court found that there were differences between the parties on quantum and therefore the matter should be referred to arbitration under condition 6.

[3] The plaintiff must give reasons or evidence to show that the defendant was not ready and willing to refer the dispute to arbitration, merely denying is not sufficient.

[4] Onus is on the plaintiff, who was opposing the stay to give sufficient reasons why the difference should not be referred to arbitration.

[5] Section 6 of the Arbitration Act 1952 clearly provides that an application for stay is made after legal proceedings have commenced. See *Heyman & Anor. v. Darwins, Limited*.

[Application for stay of all proceedings allowed.]

Cases referred to:
Lau You Timber Co. v. United General Insurance Co. Ltd. [1968] 1 MLJ 181
Supreme QBE Insurance Bhd. v. Foo Yin Toh [1987] CLJ (Rep) 993
London & North Western Railway v. Billington Ltd. [1899] AC 79
London & North Western Railway v. Jones [1915] 2 KB 35
Heyment & Anor. v. Darwins, Limited [1942] AC 356

Legislation referred to:
Arbitration Act 1952, s. 6
London & North Western Railway Co. (Rates & Charges) Order Confirmation Act 1891 [UK], s. 5

For the defendant/applicant - Khoo Eng Chin; M/s. Khoo & Sidhu
For the plaintiff/respondent - Yusuf Khan; M/s. Yusuf Lee Pathma & Marbeck

JUDGMENT

Zakaria Yatim J:

This was an application by the defendant for an order of the Court that all proceedings in this action be stayed pursuant to s. 6 of the Arbitration Act 1952. In the application the defendant stated that the plaintiff and the defendant having by an agreement in writing, namely Policy No. CMO/AR/O496 dated 5 March 1985 agreed to refer to Arbitration the Matters in respect of which this action was brought.

In the amended statement of claim the plaintiff averred that it was the lessor of five units of "Matuya", two units of "Shima Seiki" fully automatic seamless glove knitting machines and two units of "Shima Seiki" auto sewing glove knitting machines pursuant to an equipment lease agreement dated 13 April 1984 entered into between the plaintiff and one Fei Dar Industries (M) Sdn. Bhd. (hereinafter referred as the lessee). By a policy of Insurance No. CMO/Ar/0496/NEW) dated 5 March 1985 issued by the defendant to the lessee and the plaintiff as the insured for their respective rights and interests, the defendant, in consideration of the premium paid to it, agreed to indemnify the lessee and the plaintiff against loss and damage occasioned by fire, theft and accident to the said equipment up to a maximum of RM187,000 during the period 16 February 1985 to 15 February 1986. According to the plaintiff on or about 22 February 1985 during the currency of the said policy of insurance, the equipment was totally destroyed by fire and rendered useless and consequently the plaintiff had suffered loss and damage. The plaintiff then submitted their claim under the said policy in a letter dated 9 July 1985 to the defendant. The defendant in its letter dated 6 December 1986 repudiated liability and the plaintiff alleged that the defendant had failed, neglected and/or refused to pay the sum of RM187,000 less RM750,00 as specified in the excess clause.

The defendant in its affidavit in support of the application referred to condition 6 of the said policy and averred that the matters in dispute in this action were the quantum of damages to be paid under the said policy. According to the defendant there was no dispute by the

defendant on its liability under the said policy in so far as the plaintiff was concerned. The defendant also stated in the affidavit that the matters in dispute in this action were within the scope of the said policy to refer all differences arising thereunder to arbitration. The defendant also stated that the writ of summons had been served on the defendant and the defendant had caused an appearance to be entered on its behalf to the action but had taken no further step in the action. The defendant further stated that at the time the action was commenced, the defendant was, and remained, ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration in accordance with the provisions of the said policy. The defendant stated that it had a good defence to the said action on quantum and the application was not made for the purpose of delay.

The plaintiff in its affidavit in reply stated *inter alia*:

(i) the defendants were not at the commencement of the proceedings, i.e., on 6 June 1988 ready and willing to do everything necessary for the proper conduct of the arbitration;

(ii) instead the defendant had by their letter of 6 December 1986 denied liability under the policy of insurance.

(iii) the defendant's refusal to pay the plaintiff's claim under the policy of insurance which they did not dispute, did not give rise to a "difference" calling the arbitration clause in the policy into operation;

(iv) The Supreme Court had upheld the High Court Seremban's decision in Civil Appeal 12-3-86 a case which, ruled that the insured were to pay the amount insured in full unless the policy specifically provided for a method of calculation of their indemnity otherwise;

(v) the issues in this action involved interpretation of the clauses in the said insurance policy and in the circumstances the appropriate forum would be this Court.

Mr. Khoo Eng Chin, Counsel for the defendant, in his submission referred to s. 6 of the Arbitration Act 1952 and to condition 6 of the said policy and submitted that there were differences between the parties, on quantum.

Encik Yusoff Khan, Counsel for the plaintiff opposed the application for stay and submitted that the amount or the quantum was not in dispute between the parties.

In considering whether to grant or refuse the application the Court had to be satisfied with the requirements of s. 6 of the Arbitration Act, namely:

(1) There was an agreement between the parties and the agreement contained an arbitration clause;

(2) that the applicant had not taken any other other steps in the proceedings;

(3) there must be sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and

(4) that the applicant was at the time when the proceedings were commenced was still ready and willing to do all things necessary to the proper conduct of the arbitration.

In this case the agreement was entered into between the plaintiff and the defendant on 5 March 1985. The Arbitration clause was stated in condition 6 of the agreement. Condition 6 states as follows:

> If any difference shall arise between the Corporation and the insured or any claimant under this policy such difference shall be referred to a single arbitrator and the costs of the reference and award shall be in the discretion of the arbitrator. The making of an award in such reference

shall be a condition precedent to any liability of the Corporation or any right of action against the Corporation in respect of any such difference. If the Corporation shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provision herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.

The question for the Court to consider was whether pursuant to condition 6 any difference had arisen between the parties. In its affidavit in reply the defendant exhibited two letters. The first letter was written by the solicitors of the defendant on 9 February 1988 addressed to solicitors for the plaintiff. In the letter it was stated:

Dear Sirs,

Re: Equipment All Risks Policy No. CMO/AR/0496

Insured: Fei Dar Industries (M) Sdn. Bhd.

We are instructed by the Overseas Assurance Corporation Limited of Kuala Lumpur to acknowledge receipt of your letter of 29 January 1988 and to say as follows.

to enable us to consider and advise our clients on your client's claim, could you let us have the following further and better particulars:

1. What was the balance of the principal amount payable under the lease agreement as at 21 February 1985.
2. What was the Stipulated Loss Value of the equipments as at 21 February 1985.
3. What was the amount of the Security Deposit retained by your client under the lease agreement.
4. What was the pre-paid rental made to your client under the lease agreement.

We will refer the matter to our clients for further instructions upon receipt of the aforesaid particulars from you.

Yours faithfully,
Sgd/-

In reply to that letter, the plaintiff's solicitors wrote:

3 March 1988

Messrs. Khoo & Sidhu,
Advocates & Solicitors,
1st Floor,
16, Jalan Silang,
50050 kuala Lumpur.

Dear Sirs,

Re: Equipment all Risks Policy No. CMO/AR/0496

Insured: Fei Dar Industries (M) Sdn. Bhd.

We refer to your letter dated 9 February 1988 and are to state that since our clients are claiming for the full sum assured, the particulars required by you are not relevant.

Yours faithfully,
sgd/-

Upon reading this two letters, I was of the opinion that there were differences between the parties on quantum and these differences should be referred to arbitration under condition 6.

In the instant case the defendant, apart for entering appearance, had not taken any other steps in the proceedings. In para. 8 of the defendant's affidavit affirmed on 16 June 1988, the defendant averred that "the defendant was, and remain, ready and willing to do all things requisite to enable all the matters in dispute to be determined by arbitration ..." The plaintiff in its affidavit in reply merely denied the defendants averment but gave no reasons or evidence to show that the defendant was not ready and willing to refer the dispute to arbitration.

The onus was on the plaintiff, which was opposing the stay, to give sufficient reasons why the differences should not be referred to arbitration. *Lau You Timber Co. v. United General Insurance Co. Ltd.* [1968] 1 MLJ 181.

Encik Yusuf Khan in his submission referred to *Supreme QBE Insurance Bhd. v. Foo Yin Toh* [1987] CLJ (Rep) 993. In my view that case does not apply to the present case because that case was decided after a trial, and the question of referring any difference to arbitration was no longer in question. Learned Counsel also referred to the case, *Lee Kee Seng v. Mohamed Halim Ismail,* Kuala Lumpur High Court Civil Suit No. C655 of 1984 (unreported). In that case the learned Judge, following the decision of the House of Lords, in *London & North Western Railway v. Billington Ltd.* [1899] AC 79, held that the defendant did not take any steps to have the matter referred to an arbitration **before the action was instituted** by the plaintiff and that the defendant was not therefore entitle to have the action stayed under s. 6 of the Arbitration Act 1952.

It will be noted that in *London & North Western Railway v. Billington,* the decision of the House of Lords was centered on the construction of a statutory provision namely s. 5 of the London & North Western Railway Co. (Rates & Charges) Order Confirmation Act 1891 (54 & 55 Vict c. ccxxi) The section states:

> The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provident that where before any service is rendered to a trade he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience.

Earl of Halsbury LC in his speech in the *London & North Western Railway v. Billington,* said:

> that a condition precedent to the invocation of the arbitrator on whatever grounds is that a difference between the parties should have arisen; and I think that must mean a difference of opinion before the action is launched either by formal plaint in the county Courts or by writ in the superior Courts. Any contention that the parties could, when they are sued for the price of the services, raise then for the first time the question whether or not the charges were reasonable and that therefore they have a right to go to an arbitrator, seems to me to be absolutely untenable. If, in the ordinary course of things, some question had arisen between the parties, which they wanted to arbitrate upon, and a submission to arbitration were against upon in this form - which very commonly is the form - "that all matters in difference shall be submitted to A.B," it would be a condition precedent to the arbitrator entering upon any form of inquiry there that the person who insisted that there was a difference should show that the difference had arisen before the submission to arbitration was made. That is a patter which has been repeatedly decided, and I should think that no lawyer would hesitate to say that that is the true condition of law.

The decision in *Lee Kee Seng's* case also contained a passage taken from the judgment of Rowlatt J in *London & North Western Railway v. Jones* [1915] 2 KB 35. That case was also concerned with s. 5 of the English Act quoted above. Rowlatt J said:

> ... if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and **the Courts have no jurisdiction to determine that difference ...** (Emphasis added)

In my opinion, the situation in *Lee Kee Seng's* case was different from that in the present case. Having examined the authorities relied upon in that case, I did not think that *Lee Kee Seng's* case applied in the present case.

In the present case condition 6 must be read in relation to s. 6 of the arbitration. Section 6 clearly provides that an application for stay is made after legal proceedings have commenced. In *Heyman & Anor. v. Darwins, Limited* [1942] AC 356, the parties had included clause stated, 'if any dispute shall arise between the parties ... in respect of this agreement ... the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act 1889." A dispute arose between the parties and the appellants commenced an action against the respondents claiming (a) a declaration that the respondents had repudiated the contract. The respondents denied that they had repudiated the contract and applied to have the action stayed in order that it might be dealt with under the arbitration clause. The House of Lords held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed.

I respectfully agree with the decision of the House of Lords in *Heyman's* case.

For the reasons stated above I allowed the defendant's application for stay of all proceedings in this action to enable parties to refer their differences to arbitration with costs.

Also found at [1989] 2 CLJ 598